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CITATIONS

682180—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 179

STANDARD ACCIDENT INSURANCE COMPANY AND ALBERT E. MCKENZIE, AS TRUSTEE IN BANKRUPTCY OF THE GRAVES-QUINN CORPORATION, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 38–42) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on April 2, 1945 (R. 43). The petition for a writ of certiorari was filed on June 26, 1945. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether, in entering into a lump sum construction contract, the Government impliedly undertakes not to enter into cost-plus-fixed-fee construction contracts in the same locality while the lump sum contract is in the course of performance.

STATEMENT

Petitioners, a surety on a performance bond, and a trustee in bankruptcy, of the Graves-Quinn Corporation (hereinafter referred to as the contractor) (R. 1, 13–15, 38), filed a petition in the Court of Claims seeking to recover moneys on claims arising out of a contract between the Contractor and the United States (R. 1–13). The petition alleged three causes of action (R. 1–6, 6, 6–13), the third of which was the only one common to both petitioners (R. 6). Since the judgment dismissed the third cause of action alone (R. 43), only the facts alleged in the petition with respect to that cause of action are here pertinent. They are as follows:

On September 14, 1940, the contractor entered into a contract with the United States, through the War Department, for the construction of temporary houses at Harbor Defenses, Boston, Narragansett Bay, Massachusetts, at Portland, Maine, and at Newport, Rhode Island. The contract called for lump sum payment of $1,008,800. (R. 2, 16.) The petition alleged that although the con-

tractor "contemplated and understood that the Government would do nothing which would interfere or prevent the orderly and contemplated method of performing" its contract, "immediately after the awarding of the contract [the United States], through its duly authorized agencies made independent contracts" with other contractors "for the construction of various Government facilities in the immediate vicinity"; and that these "other contracts were for the most part let upon a cost plus a fixed fee basis." Petitioners then alleged that "the effect of the Government's action was that the Contractor was unable to employ laborers and mechanics in the normal course" since they were "being drawn to the cost plus fixed fees jobs"; that "unless the Contractor permitted laborers to be employed for longer hours resulting in the payment of overtime wages, practically no laborers would be available"; that "the Contractor was left with inefficient sources from which to draw his laborers"; and that "the effect of the award of the cost plus fixed fee contracts was to raise the price of the materials in the immediate vicinity, thereby forcing the Contractor to pay higher prices for materials necessary to the performance" of its contract. Petitioners further alleged that the United States "knew at or about the time of the advertising for bids resulting in the award" of the contract in question "that it intended to enter into very substantial construction contracts [in the same

vicinity] on a cost plus a fixed fee basis" and that "any Contractor having a lump sum contract in the immediate vicinity would be compelled to meet abnormal circumstances not contemplated or agreed to by the bidder." (R. 7.) On the basis of these allegations, petitioners averred that "the Contractor was damaged in the sum of $397,200" (R. 12) which sum "is now due and owing from the [United States] to the claimants" (R. 13). The petition further alleged the Contractor's claim had previously been presented to and rejected by the contracting quartermaster of the War Department (R. 8–10) and the Comptroller General (R. 10–12.)

On March 31, 1944, the United States filed a demurrer to this cause of action (R. 37–38). The court below sustained the demurrer and dismissed the petition as to this cause of action (R. 43) [1] on the ground that petitioners' allegations were "not sufficient to show that there was a breach of the contract in suit by the [United States] which would entitle the contractor or [petitioners] to recover the alleged increased performance costs as damages" (R. 41).

ARGUMENT

The court below properly ruled that petitioners' allegations failed to establish a right to recover, as damages, the contractor's alleged increased performance costs.

[1] The court below remanded the first and second causes of action to its General Docket (R. 43).

It is settled law that in the absence of fraud, accident, or mistake, supervening conditions or circumstances which may render a contractor's performance of a contract more difficult and expensive do not excuse the contractor from performance in accordance with the contract terms, or entitle it to relief after performance. *Jones* v. *United States,* 96 U. S. 24, 29; *Carnegie Steel Co.* v. *United States,* 240 U. S. 156, 164–165; *Day* v. *United States,* 245 U. S. 159, 161; *Columbus Ry. & Power Co.* v. *Columbus,* 249 U. S. 399, 412–414; *LeVeque* v. *United States,* 96 C. Cls. 250; *Williston on Contracts* (Rev. Ed., 1937) § 1963; *Restatement of Contracts,* § 467. "The answer to the objection of hardship in all such cases is that it might have been guarded against by a proper stipulation." *The Harriman,* 9 Wall. 161, 172–173. In an effort to circumvent this well established principle, petitioners invoke the rule that "it is an implied condition of every contract that neither party will hinder the other in his discharge of the obligations imposed upon him" (Pet. 11), and contend that the "acts of the Government" in letting cost-plus-fixed-fee contracts in the vicinity of the lump sum contractor so increased the latter's cost of performance as to constitute a "breach" of its contract with the Government (Pet. 7). Although the correctness of this rule is beyond challenge (*Restatement of Contracts,* § 315), petitioners disregard the obvious limitation upon it, *i. e.,* that it has no

application where, under the terms of the contract, surrounding circumstances, or customs of business, the hindrance was permitted or might have been anticipated by the parties. *Restatement of Contracts,* § 315 (1) (b) and illustration 3; *Williston, supra,* § 1293 A. The facts of this case and the applicable rules of law make it clear that the governmental action of which petitioners complain was not only permissible, but a risk naturally and properly to be anticipated by the contractor.

The contract in question was executed on September 14, 1940 (R. 2). Prior thereto, Congress had, on July 2, 1940, authorized the Secretary of War to "expedite the strengthening of the national defense" for the fiscal year ending June 30, 1941 by providing "for the necessary construction * * * at military posts, depots, stations, or other localities, of plants, buildings, facilities, utilities, and appurtenances thereto" (sec. 1 (a), 54 Stat. 712)[2] and specifically authorized the use of the "cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War" (*id.* at 713). The contracts about which petitioners complain were concededly authorized by this Act (Pet. 8). Parties to a contract are presumed to know of existing statutes which may affect its operation or performance, and the con-

[2] The appropriation Act providing moneys for the carrying out of this enactment was approved on September 9, 1940, 54 Stat. 872, 873.

tract in suit contains no express stipulation or warranty that the Government would not let contracts on a cost-plus-fixed-fee basis in the same vicinity.[3] It is thus clear that the contractor in the instant suit had, in the words of the court below, "assumed the risk of meeting the changed conditions of which complaint is now made" (R. 41).[4] This factor alone precludes petitioners' recovery against the United States. *Restatement of Contracts,* § 315 (1) (b).

Moreover, the United States when sued as a contractor cannot be held liable for an obstruction to the performance of a particular contract resulting from its general acts as a sovereign. *Horowitz* v. *United States* 267 U. S. 458, 461. It is clear that the action of the Government in letting the cost-plus contracts not only was permissible but, it must be assumed, was the most appropriate method "to expedite the strengthening of the national defense" (54 Stat. 712). Contrary to petitioners' contention, such action may not be made a basis

[3] Indeed, as the court below pointed out, the contract in question "expressly recognized the existence and effect of the National Defense and Appropriation acts above mentioned by deleting from the standard contract form art. 11 prohibiting the working of any laborer or mechanic more than eight hours in any calendar day" (R. 42). See Section 4 (b) of the Act of July 2, 1940, 54 Stat. 712, 714, and R. 9.

[4] Cf. *Wells Brothers* v. *United States*, 254 U. S. 83, 87, where Mr. Justice Clarke observed that "Men who take million-dollar contracts for Government buildings are neither unsophisticated nor careless."

for imputing inequitable conduct to the Government such as would sustain an action for an implied breach of contract. *Horowitz* v. *United States,* 267 U. S. 458; *Deming* v. *United States,* 1 C. Cls. 190; *Jones* v. *United States,* 1 C. Cls. 383; *Wilson* v. *United States,* 11 C. Cls. 513; *Maxwell* v. *United States,* 3 F. 2d 906 (C. C. A. 4), affirmed *per curiam,* 271 U. S. 647; *United States* v. *Warren Transp. Co.,* 7 F. 2d 161 (D. Mass.); cf. *Columbus Ry. & Power Co.* v. *Columbus,* 249 U. S. 399; *Megan* v. *Updike Grain Corp.,* 94 F. 2d 551 (C. C. A. 8).

Petitioners' assertion that their "complaint is not directed against any Governmental enactment" but against "the action of the War Department in its capacity as a contracting party" (Pet. 8) is not persuasive. This Court has recognized that the "'two characters which the government possesses as a contractor and as a sovereign cannot be thus fused'" and that "'the United States while sued in the one character [cannot] be made liable in damages for their acts done in the other * * * be they legislative or executive, so long as they be public and general.'" *Horowitz* v. *United States,* 267 U. S. at p. 461, quoting from *Jones* v. *United States,* 1 C. Cls. 383, 384. If petitioners mean to suggest that the War Department had agreed or undertook not to let in petitioners' vicinity such other contracts as might be deemed necessary to carry out and fulfill

the requirements of existing Acts of Congress (Pet. 8–9), such an agreement, or undertaking would, as the court below observed, "have been in violation of the acts of Congress and, therefore, beyond the authority conferred upon the contracting officer" (R. 41).

Contrary to petitioners' contention, the decision of this Court in *United States* v. *Joseph H. Beuttas,* No. 431, October Term, 1944, decided April 23, 1945, directly supports the decision below. In that case, this Court rejected the contention that the Government, by inviting bids for the construction of a superstructure at minimum wage rates higher than those specified in a contract for the construction of the foundation, had so increased the foundation contractors' costs of performance as to constitute an implied breach of their contract. The Court stated, in light of the findings of the Court of Claims, that there was "no basis for a holding that the Government knowingly hindered [the foundation contractors] in the performance of the contract or culpably increased their costs" (pamphlet p. 4). In the instant case, the Government's action in letting cost-plus-fixed-fee contracts pursuant to an Act of Congress would likewise not afford a sufficient "basis for a holding that the Government knowingly hindered * * * the performance," or "culpably increased" the costs of the contract in question.

CONCLUSION

The decision below is correct and no conflict exists. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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